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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1046

GEORGE WEISS,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner George Weiss prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled case on November 27, 1963.

Opinion Below

There has been no opinion written in the court below, or in any of the lower or intermediate appellate courts.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on November 27, 1963. On February 13, 1964, Mr. Justice John M. Harlan granted an order ex-

tending the time of petitioner to file his petition for a writ of certiorari to and including April 25, 1964. On February 27, 1964, the Court of Appeals granted petitioner's motion to amend the remittitur and thereupon amended the remittitur by holding that on the appeal to said court there were presented and necessarily passed upon questions under the Constitution of the United States, viz: whether § 1142-a of the Penal Law of the State of New York is unconstitutional as repugnant to the First and Fourteenth Amendments to the said Constitution, both on its face and as applied to the facts of this case and further, as violative of the equal protection clause of the Fourteenth Amendment as applied to this petitioner. Said court held that no constitutional rights of petitioner were violated. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1257 (3).

Questions Presented

The following questions are presented in this case:

1. Whether § 1142-a of the Penal Law of the State of New York is unconstitutional as abridging the freedom of speech and of the press, contrary to the First Amendment of the Constitution of the United States.

2. Whether in the application of the law as embodied in § 1142-a of the Penal Law of the State of New York, to petitioner, he was denied the equal protection of the laws, in violation of Fourteenth Amendment to the Constitution of the United States.

3. Whether § 1142-a of the Penal Law of the State of New York is vague and indefinite on its face, so as to render

petitioner's prosecution violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Statutes Involved

The statute involved in this case is § 1142-a of the Penal Law of the State of New York, which reads as follows:

> "§ 1142-a Advertisements relating to certain diseases prohibited
>
> "Whoever publishes, delivers or distributes or causes to be published, delivered or distributed in any manner whatsoever an advertisement concerning a venereal disease, lost manhood, lost vitality, impoteney, sexual weakness, seminal emissions, varicocele, self-abuse or excessive sexual indulgence whether described by such names, words, terms or phrases, or by any other names, words, terms or phrases, calculated or intended to convey to the reader the idea that any of said diseases, infirmities, disabilities, conditions, or habits are meant or referred to, and calling attention to a medicine, article or preparation that may be used therefor or to a person or persons from whom or an office or place at which information, treatment or advice relating to such disease, infirmity, habit or condition may be obtained, is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment for not more than six months, or by a fine of not less than fifty dollars nor more than five hundred dollars, or by both such fine and imprisonment. This section, however, shall not apply to didactic or scientific treatises which do not advertise or call attention to any person or persons from whom or any office or place at which information, treatment or advice may

be obtained, nor shall it apply to advertisements or notices issued by an incorporated hospital, or by a licensed dispensary, duly certified by the local board of health as a venereal disease clinic, or by a municipal board or department of health or by the department of health of the state of New York. Added L. 1917, c. 487; amended L. 1940, c. 371, § 3, eff. April 1, 1940."

STATEMENT OF THE CASE

The Information

The information in this case was in two counts, in which the petitioner was accused of violation of Section 1142-a of the Penal Law of the State of New York, alleging in Count 1 thereof that on or about September 11, 1960 in the County of New York the petitioner did cause to be published, delivered and distributed in the Spanish Language Newspaper, *La Prensa* "an advertisement that he was a practicing physician and would be willing to treat male patients for lost vitality and lost manhood." The second count charged the same offense in the same pleading language, except that the offense was alleged to have been committed on April 2, 1961.

The Record

The record in this case before the Court of Appeals of the State of New York consisted of the complete record on appeal before the Appellate Division of the Supreme Court of the State of New York, and constituted the entire record before the former Court of Special Sessions of the City of New York. A certified copy of this record on appeal is being submitted to this Court with this case.

Federal Question Raised

The federal question raised by this case was first raised before the court of original jurisdiction, the former Court of Special Sessions of the City of New York, and said federal questions have continued to be raised before both the Appellate Division of the Supreme Court of the State of New York and the Court of Appeals of the State of New York. The petitioner's motion to amend the remittitur in this case, which was granted by the Court of Appeals, reflects that that court necessarily considered and passed upon the federal questions raised herein.

The Facts

The facts in this case insofar as they relate to the questions presented for consideration by this Court concern the advertisement printed in the Spanish Languago in the newspaper *La Prensa* on the two occasions referred to in the separate counts of the information and the written translation of this advertisement into the English Language. Exhibit 7 received in evidence (Record on Appeal, p. 80) reads as follows:

> "Consult With Dr. Weiss
>
> Stomach & Abdominal Surgeon, Rectal Postule etc., Head, Chest, Tumors, Ulcers & Glands, Womens' Diseases, Acute & Chronic Personal Problems of the Woman, Debility & Rejuvenation for the Men, Prostrate, Urinary, Cronic & Acute Affections. Plastic! —Stomach, Breasts, Nose-Rejuvenation, Operations, Wrinkles, Bags, Facial Scars, *I speak Spanish*. Moderate Fees. Personal Attention, 2 Offices! 609 W 135th St. 4 & 9 P.M. 1005 Hoe Ave. Near Simpson

Station. Evenings 7 to 9. Daily & Sundays. DA 3-5606."

The prosecution contended that this advertisement violated § 1142-a of the Penal Law; petitioner contended it did not, and contended that the advertisement contained no reference whatever to treatment for "lost vitality" or "lost manhood" and that at no time did he publish or advertise anything in connection with matters proscribed by the statute in question. Petitioner also contended that the advertisement was not correctly translated and that the newspaper itself arranged the words contrary to his advertisement rather than printing it as submitted. Petitioner also stated that the terms in the advertisement "debility" and "rejuvenation" refer to petitioner's specialized practice as a plastic surgeon and did not and was not intended to refer to any proposal for sexual surgery or treatment. It is to be pointed out that the publication of this advertisement is not a violation of any law of the State of New York or of the medical canons of ethics.

Reasons for Granting the Writ

1. The reasons for granting the writ of certiorari in this case are as follows. Section 1142-a of the Penal Law of the State of New York is unconstitutional as abridging the freedom of speech and of the press, contrary to the First Amendment of the Constitution of the United States. It is rather unfortunate that any opinion of the Courts of the State of New York was petitioner's contention, originally raised by a timely motion to dismiss the information on the ground of its federal constitutional invalidity (Record, p. 12). In the case of *People* v. *Morris*, 259 App. Div. 738,

18 N.Y. Supp. 2nd 448, the Appellate Division of another department stated without discussion "that § 1142-a is not offensive of any constitutional provision, citing *People* v. *Sanger*, 222 N.Y. 192, which itself related to a different section of the Penal Law. It is petitioner's contention that the publication of this advertisement is an exercise on his part of freedom of speech and of the press, as guaranteed by the First Amendment of the Constitution of the United States. The only case directly in point hereon is *People* v. *Levenson*, a California case reported in 183, C.A. 2d 863, which held unconstitutional a similar statute in the State of California. In that case the Court relied upon this Court's decisions *In Matter of Jackson*, 96 U.S. 727 and *Smith* v. *California*, 361 U.S. 147. The *Levenson* case was followed and approved in another case in California, *In Re Schillaci*, 196 C.A. 2d 591. It is submitted that a criminal prosecution for the publication of the advertisement involved in this case is violative of petitioner's protections and rights under the First Amendment to the Constitution of the United States.

2. Assuming *arguendo* that the statute involved herein is constitutionally valid, nevertheless its application to the facts of this case denied petitioner the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States. A reading of the advertisement in the Spanish Language, and its English translation must leave one with a clear impression that petitioner did not advertise that he would or could restore "lost manhood" or "lost vitality," as denounced by this statute, or that he would perform any sexual operation of a restorative nature. The advertisement related solely and wholly to plastic surgery and to surgical procedures for the elimina-

tion of "Debility and Rejuvenation for the men." Any other interpretation flies in the face of the clear language of the advertisement. It is quite apparent that the principal objection here is to petitioner's use of the newspapers for advertising his medical services, which is frowned upon by the authorities, but which is clearly not violative of any penal statute. It is only by a tortured construction of language that a criminal charge was fashioned against this petitioner.

3. Section 1142-a of the Penal Law of the State of New York is vague and indefinite on its face, so as to render petitioner's prosecution violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The principal vice of the statute in question herein is the lack of definition of its terms. Since it is not disputed that a penal statute is to be strictly construed and the conduct proscribed thereby is to be clear and definite, the attempted construction of this statute to fit the facts of this case so as to bring it without proscribed conduct, renders the statute vague and indefinite on its face as to make it unconstitutional. This statute has never before been presented to this Court for a construction or decision as to its constitutional status.

CONCLUSION

For all of the foregoing reasons this petition for a writ of certiorari to the Court of Appeals of the State of New York should be granted.

Respectfully submitted,

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Counsel for Petitioner